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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-2067

BEVERLY CAMP SIMPSON,

Petitioner,

v.

JOHN G. SIMPSON, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO BRIEF FOR
THE RESPONDENT

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REPLY BRIEF TO BRIEF FOR THE RESPONDENT

Rule 24(4) of the Rules of the Supreme Court of the United States permits petitioner to file a reply brief to respondent's brief in opposition to the granting of a writ of certiorari.

While the timeliness of the filing of the petition for a writ of certiorari was not raised by the respondent, petitioner (hereinafter referred to as "Ms. Simpson") would bring the following to the attention of the Court. Petitioner's counsel delivered

forty printed copies of the petition to a courier in Atlanta, Georgia, at noon on July 23, 1974.[1] The deadline for filing the petition was midnight of that same day. Counsel so informed the courier and was assured that there would be no problem in obtaining delivery of the petition to the Supreme Court building before midnight. It was not until the next day, July 24, 1974, that counsel discovered by calling the Clerk's office that in fact the petition did not arrive until approximately 5:30 a.m. on July 24, 1974. Thus the petition was not timely filed, having arrived some five and a half hours late, but before the beginning of normal office hours on the day of arrival. The failure of the petition to arrive prior to midnight was not due to the negligence or delay of Ms. Simpson's counsel, but rather to circumstances beyond counsel's control.

Respondent concedes the jurisdiction of this Court. Brief of Respondent, 2. Service on respondent was not affected by the filing delay and no contention is made that he was in any manner prejudiced.

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1. The courier was a professional courier whom petitioner's attorneys had used a number of times in the past for the purpose of filing papers with various courts, including this Court. Timely filing had always been accomplished under time schedules similar to the one involved here. See Affidavit of Counsel, Addendum hereto. The original is on file with the Clerk of this Court.

Untimely filing of a petition for writ of certiorari is not a jurisdictional defect where the time is set by Court rule. Durham v. United States, 401 U.S. 481 (1971); Schacht v. United States, 398 U.S. 58, 63-65 (1970); Taglianetti v. United States, 394 U.S. 316 n. 1 (1969); Heflin v. United States, 358 U.S. 415, 418 n. 7 (1959). The time for filing the petition here is set by statute. 28 U.S.C. §2101(c).

In view of the fact that the petition arrived only a few hours late, that there was no prejudice to respondent as a result thereof, and that petitioner's counsel had made every reasonable effort to assure a timely arrival of the petition, Ms. Simpson submits that there was substantive compliance with 28 U.S.C. §2101(c) and the untimeliness of the filing of the petition should not stand as a bar to the Court's jurisdiction in this case.

In addition to responding to the issues presented in Ms. Simpson's petition (the statutory construction given Title III of the Omnibus Crime Control and Safe Streets Act of 1968 by the court below, and the constitutionality of that construction), respondent (hereinafter "Mr. Simpson") has submitted several alternative reasons for denying the petition.

THERE IS NO BASIS FOR HOLDING THAT THE PETITIONER IMPLIEDLY CONSENTED TO THE INTERCEPTION

Mr. Simpson's first alternative argument is that, as a matter of law, a wife gives consent to her husband's interception of her telephone communications in the marital domicile. Respondent's Brief, 35-38. Mr. Simpson suggests that the wife's implied consent flows from some kind of overweening necessity to recognize the husband as the head of the household. This theory, if not defunct as a matter of constitutional law, is eroding rapidly as a factual matter and certainly cannot be stretched so far as to give it the implications argued for by respondent.

It should be noted that there were no facts in evidence, other than those commonly associated with the marital relationship, from which Ms. Simpson's consent could have been presumed or inferred.[2] The trial court

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2. Respondent's brief is somewhat confusing on this point. He first states, in agreement with the trial court, that there was evidence that Ms. Simpson did not give her actual consent. Respondent's Brief 19 and 2a. However, the respondent also states, "There was no evidence that the petitioner did not give her actual consent to the intercepted communications." Respondent's Brief, 42. Mr. Simpson testified at the trial that he did not obtain Ms. Simpson's permission to make the recordings (T-134).

made it clear that it was deriving the theory of implied consent from its understanding of Alabama common law, which it thought to recognize a doctrine of the legal unity of husband and wife. T-199-203, quoted in Respondent's Brief, 1a-4a. Whether this interpretation of Alabama law is correct is discussed immediately below in connection with Mr. Simpson's second alternative reason for denying the writ.

ALABAMA LAW DOES NOT RECOGNIZE A DOCTRINE OF INTERSPOUSAL IMMUNITY WHICH WOULD BAR THIS SUIT.

A second alternative ground for denying the writ raised by respondent's brief is that Ms. Simpson's cause of action under 18 U.S.C. §2520 is barred by the doctrine of interspousal immunity as a matter of Alabama law. Respondent's Brief, 38-40. As respondent points out, the trial court did hold that Alabama's doctrine of interspousal immunity would operate to bar this particular suit. Petitioner contended on appeal to the court of appeals and now contends that this was a clearly erroneous application of Alabama law, and that Alabama does not recognize interspousal immunity.

In Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917), the Supreme Court of Alabama held that a wife may maintain an action to recover damages for assault and battery committed upon her person by her husband, stating as follows:

> We think, then, that the question before us may be appropriately

> stated in the following form: Have our Statutes on the subject of the rights of married women left unchanged the theory of legal identity, of all the foundation of the marital status, merely providing exceptions to the necessary consequences of that theory, or has that foundation been so substantially changed that, except as disabilities have been retained, each has against the other, all the rights of persons not so related? Under our statutory system, our opinion is that the later alternative may and should be adopted.
> Id. at 43.

The court further stated that Alabama's femme sole statutes "have the effect of abrogating the fiction of legal identity, and seem thereby, except as otherwise prescribed, to destroy the foundation of the common law in its applications to questions touching the rights of husband and wife inter se." Id. This opinion was reaffirmed in Penton v. Penton, 223 Ala. 282, 285, 135 So. 481 (1931), and Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932) ("no sound reason can be stated why [the wife] could not maintain an action for any tortious injury by [the husband] to her") (emphasis added).

Mr. Simpson's contention that common law disabilities remain unless, by statute, the disabilities are clearly intended to be removed, see Respondent's Brief at 39, does

not help him in this case. The Alabama Supreme Court cases cited herein establish that Alabama has taken a different approach in interpreting the effect of Alabama's femme sole statutes. Since the legal fiction of the unity of husband and wife has been abrogated by Alabama's case law, the trial court's rationale for holding Ms. Simpson's suit barred (T-200-203, quoted in Respondent's Brief, 1a-4a), was erroneous. Nor was it relied upon by the court of appeals.

THERE WAS NO FATAL FAILURE OF PROOF AS TO ELEMENTS OF PETITIONER'S CAUSE OF ACTION

Respondent's final alternative argument for denying the writ is that there was a failure of proof of two elements of petitioner's cause of action. Respondent's Brief, 40-43. As to the matter of Ms. Simpson's failure to prove that the intercepted wire communications were made "through the use of facilities. . .furnished or operated by any person engaged as a common carrier and providing or operating such facilities for the transmission of interstate or foreign communications," 18 U.S.C. §2510(1), petitioner submits that adequate evidence was introduced at trial for the trial judge and the jury to reasonably conclude that the telephone in question was provided by the only telephone company that provides service in that area and it was clearly understood that this was a common carrier providing for interstate communications as contemplated by the statute.

Respondent relies upon United States v. Blattel, 340 F.Supp. 1140 (N.D.Iowa 1972) for his argument that this failure of proof was fatal to Ms. Simpson's cause of action. In United States v. Bennett, 358 F.Supp. 580, 583 (S.D.Tex. 1973), the court found Blattel "neither authoritative nor persuasive," and upheld a conviction under the criminal penalty provisions of Title III, despite the absence of specific proof of this rather technical point.

Respondent also asserts a failure of proof that no party to the conversation had given consent to the interception. As already mentioned, Mr. Simpson himself testified that he did not obtain Ms. Simpson's permission to record her telephone conversations (T-134). The record in its totality provides ample support for an inference that there was no consent by any party to the recorded conversations, implied or in fact. The rules of evidence do not require the proving of a negative.[3]

Mr. Simpson contends that Section 2520 must be construed strictly, "as if the

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3. To accept Mr. Simpson's argument, then likewise Ms. Simpson would have had to prove that Mr. Simpson was not acting on behalf of a communication common carrier, 18 U.S.C. §2511(2)(a), that he was not an agent or employee of the F.C.C., 18 U.S.C. §2511(2)(b), and that he did not have an authorized search warrant to monitor conversations over his home telephone.

statutes were criminal statutes only." Respondent's Brief, 20. However, the civil damages provision of Title III, 18 U.S.C. §2520, under which this suit was brought, is primarily remedial, not penal. See, e.g., Senate Report, 1968 U.S. Code Cong. & Admin. News 2156 (quoted in the opinion of the court of appeals, Appendix to Petition, 7a n. 9). In construing the civil liability provision of the Truth in Lending Act, 15 U.S.C. §1640, this Court said, "We cannot agree. . .that every section of an act establishing a broad regulatory scheme must be construed as a 'penal' provision. . .merely because two sections of the act provide for civil and criminal penalties." Mourning v. Family Publications Service, Inc., 411 U.S. 356, 375 (1973).

Judicial construction of Section 2520 should begin with recognition of its remedial purpose, and with an eye toward furthering the remedy rather than constructing barriers to it. "'Exceptions' not mentioned in the Act should not lightly be read into it." Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740, 745 (5th Cir. 1973). As plaintiff in a civil damages suit, Ms. Simpson is not held to the standards of proof and statutory construction applicable to criminal prosecutions. Cf. Starks v. New Orleans Motors, Inc., 372 F.Supp. 928, 931 (E.D.La. 1974). This is not a criminal proceeding and a finding of civil liability would not provide a basis for a criminal conviction. Ms. Simpson should not be held to stand in the shoes of a government prosecutor when attempting to avail herself of a civil remedy

enacted by Congress to stop abuses and violations of public policy which result in injury to private individuals.

CONCLUSION

In enacting Title III, Congress determined, and unambiguously stated its determination, that henceforth the privacy of every person's communications with others should be protected from certain insidious means of eavesdropping. Spouses, business associates, politicians and others are not prevented from discovering the truth of their suspicions about each other; they are merely forbidden to use certain proscribed devices. The opinion of the court of appeals below carves a gaping hole in the application of the wiretap act, for it leaves untrammelled the use of bugging and wiretap devices in one situation which presents perhaps the easiest and most tempting opportunity for their utilization by private citizens. As respondent suggests, Congress did indeed intend justice and reason, and not injustice and oppression. To grant the petition and reverse the court of appeals would effectuate that intent.

Respectfully submitted,

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Neil Bradley
Charles Morgan, Jr.
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Of Counsel

Attorneys for Petitioner

ADDENDUM

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AFFIDAVIT

Comes now Neil Bradley who, being duly sworn, states as follows:

I am one of the counsel for petitioner in the above-styled cause.

On July 23, 1974, at approximately noon, E.D.T., I delivered forty copies of the petition for writ of certiorari in this cause, along with other necessary papers for filing, to Purolater Courier Corporation, a professional courier. This was done at my office in Atlanta, Georgia.

I had used the services of this courier

company on a number of occasions prior to that date, including for the purpose of filing papers with this Court. On each such occasion, the papers had been delivered in time to meet the filing deadline.

On this occasion, I instructed the courier company in making the arrangements that morning that the petition had to be delivered to the guard at the Supreme Court Building prior to midnight of that day, and was assured there would be no problem in accomplishing this.

On July 24, 1974, at 2:55 p.m., E.D.T., I telephoned the clerk's office of this Court in a routine follow-up to be certain the petition was properly filed. The person in the clerk's office to whom I spoke, whose name I do not have, asked me if I was aware that the petition was late. I said I was not, and was then informed that it had been received at 5:30 a.m., that morning. I was then asked if I wanted the petition filed and I stated that I did.

s/Neil Bradley
Neil Bradley

SWORN TO AND
SUBSCRIBED before
me this 5th day of
October, 1974.

s/Charles A. Shanor
Notary Public
(Seal)